

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON

DAVID B. LOWRY,

Plaintiff,

vs.

KENNETH S. APFEL, in his capacity  
as the Commissioner of the Social  
Security Administration; DAN R.  
HYATT; RILEY ATKINS; and  
BENNETT ENGELMAN,

Defendants.

CV 99-1210-ST  
OPINION AND ORDER

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Attorneys for Defendants

1 REDDEN, Judge:

2 Magistrate Judge Stewart filed her Findings and Recommendation on March 2,  
3 2000. The matter is now before me pursuant to 28 U.S.C. § 636(b)(1)(B) and Fed. R.  
4 Civ. P. 72(b). Decisions on dispositive issues under 28 U.S.C. § 636(b)(1)(B) are  
5 reviewed de novo. United States v. Raddatz, 447 U.S. 667, 673 (1980); Bhan v. NME  
6 Hospitals, Inc., 929 F.2d 1404, 1414 (9th Cir. 1991). When a party objects to any portion  
7 of the magistrate's findings and recommendation, the district court must make a de novo  
8 determination of that portion of the magistrate's findings and recommendation. 28  
9 U.S.C. § 636(b)(1)(B); McDonnell Douglas Corp. v. Commodore Business Machines, 656  
10 F.2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982); United States v.  
11 Remsing, 874 F.2d 614 (9th Cir. 1989).

12 Plaintiff and defendants have timely filed objections. I have, therefore, given the  
13 file of this case a de novo review.

14 I disagree with defendants' position that plaintiff had an adequate remedy under  
15 the Commissioner's disqualification regulations, the Hearings, Appeals and Litigation  
16 Law (HALLEX) manual, interim procedures regarding bias or misconduct, and Program  
17 Operation Manual System (POMS). It is true that plaintiff knew of and availed himself  
18 of the procedures when he submitted bias and unfairness complaints to the Regional  
19 Chief ALJ and to the Appeals Counsels. However, plaintiff was informed on  
20 December 3, 1998 that an investigation of his complaints would be conducted; that  
21 investigation is still pending. He was then informed by letter dated April 26, 1999 by the  
22 Regional Chief ALJ (in response to a demand letter sent by plaintiff's attorneys) that  
23 there was no statutory or regulatory authority for the relief plaintiff requested. The  
24 Regional Chief ALJ went on to say that even if such authority existed, he would not use  
25 it with respect to Lowry's complaints. Thus, I agree with Magistrate Stewart's conclusion  
26 that the Commissioner's bias and unfairness procedures were inadequate and that  
27 plaintiff had no other remedy for his complaints.

28 I also agree with Magistrate Stewart's conclusion that defendants' motion to

1 dismiss for lack of standing should be granted as to defendants Atkins and Engelman  
2 without prejudice and with leave to replead.

3 Therefore, I ADOPT the Magistrate's Findings and Recommendation (doc. 26)  
4 that:

5 (1) Defendants' motion to dismiss for lack of subject matter jurisdiction (doc. 5)  
6 and for stay of scheduling order should be DENIED;

7 (2) Defendant's motion to dismiss for lack of standing (doc. 8) should be  
8 DENIED as to defendants Hyatt and Apfel and GRANTED as to defendants Atkins and  
9 Engelman without prejudice and with leave to replead;

10 (3) Defendant's motion to dismiss for failure to state a claim (doc. 14) should  
11 be DENIED; and

12 (4) The current discovery and pretrial order dates should be stricken, discovery  
13 stayed, and a new case schedule set after the pending motions are resolved.

14 IT IS SO ORDERED.

15 Dated this 7th day of June, 2000.

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18 S/S James A. Redden  
19 James A. Redden  
United States District Judge  
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